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No. 83-2160 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT LEE ELLIOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's enhanced sentence imposed under 21 U.S.C. 841(b) should be set aside on the ground that the sentencing court did not inquire, before imposing the sentence, whether petitioner admitted his prior conviction, when petitioner's counsel had previously admitted the conviction and petitioner does not deny its existence or validity.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1984. The petition for a writ of certiorari was filed on June 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted on one count of conspiracy to possess and distribute preludin (Count 1), in violation of 21 U.S.C. 841 and 846; two counts of unlawful possession with intent to distribute preludin (Counts 2 and 4), in violation of 21 U.S.C. 841(a)(1); and two counts of distributing preludin (Counts 3

and 5), in violation of 21 U.S.C. 841(a)(1). The trial court ruled that each possession count merged with a distribution count. Because petitioner had previously been convicted of a drug-related offence, his sentences were enhanced pursuant to 21 U.S.C. 841(b)(1)(B), and the district court imposed three consecutive sentences of 10 years' imprisonment, together with $90,000 in fines. Petitioner was also sentenced to 10 years' special parole on merged Counts 2 and 3 and a consecutive term of 10 years' special parole on merged Counts 4 and 5.

1. In November 1981, prior to trial, the government filed an information against petitioner, pursuant to 21 U.S.C. 841(b) and 851, requesting an increased sentenced in the event of conviction on the ground that petitioner had, on April 3, 1973, been convicted in the District of Columbia of the unlawful distribution of heroin, in violation of 21 U.S.C. 841 (C.A. App. 6a). During argument at a bail reduction hearing, petitioner's attorney acknowledged petitioner's prior conviction, informing the court that petitioner "did serve some time in 1973 in Washington, D.C., for felonious violation of the distribution of heroin" (*id.* at 34a) and that petitioner, in an earlier bail hearing before a magistrate, "took the stand and admitted he served the time" (*id.* at 35a). In denying petitioner's request for bail reduction, the district court noted, among other things, that petitioner's prior conviction enhanced the maximum penalties he could incur (C.A. App. 8a-9a).

At trial, petitioner's attorney again referred to petitioner's prior conviction and successfully argued that it was not a proper subject for cross-examination in light of the fact that petitioner had received a certificate of rehabilitation (C.A. App. 47a-64a). At sentencing, petitioner's attorney challenged various matters contained in the presentence report but agreed that petitioner was convicted in 1973 on a narcotics charge; petitioner's counsel stated: "Now, judge,

he was convicted in 1973 and he admits the conviction and he served his time" (*id.* at 70a). Before imposing sentence, the district court asked whether petitioner wished to address the court; petitioner urged that the presentence report made him appear to be a more important drug dealer than he was, but petitioner did not intimate that his counsel was inaccurate in attributing to him an admission to the prior offense (*id.* at 73a-74a). The court, after stating that petitioner was subject to an increased penalty because of the prior conviction, imposed sentence (*ibid.*), and petitioner's attorney subsequently advised the court that there was no technical problem with the sentence (*id.* at 75a). The court of appeals affirmed the conviction. *United States* v. *Elliott*, 696 F.2d 992 (4th Cir. 1982) (Table).

2. Petitioner subsequently filed a motion under Fed. R. Crim. P. 35, seeking to correct his sentence. Petitioner challenged his sentence on the ground that the court had violated 21 U.S.C. 851(b) by failing to ask him whether he affirmed or denied his prior conviction. The district court denied the motion (Pet. App. 1b-2b), and the court of appeals affirmed (*id.* at 1a-3a). It noted that petitioner's attorney "admitted the prior conviction[] three times in open court" and held that petitioner accordingly could not complain that "error was committed as to lack of acknowledgment of prior convictions" (*id.* at 2a).

ARGUMENT

21 U.S.C. 851(b) specifies that if the United States Attorney files an information seeking an enhanced sentence on the basis of a prior conviction, the sentencing court "shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be

raised to attack the sentence." Petitioner is correct in asserting that the district court failed to comply with this provision. But petitioner does not suggest that he was prejudiced by this failure in any way. Petitioner acknowledges (Pet. 8) that his attorney admitted three times that he had in fact been convicted of the offense described in the information; as we noted, petitioner's attorney stated that petitioner himself testified that he had been convicted of that offense. Petitioner does not deny that he was convicted of that offense; nor does he suggest that he is seeking to challenge that conviction. In short, petitioner does not suggest that, had the district court asked, he would have done anything other than affirm the prior conviction. In addition, because the offense specified in the information occurred more than five years before the information was filed, it appears that 21 U.S.C. 851(e) barred petitioner from challenging it in this case.

The district court's error therefore was plainly harmless, and petitioner does not suggest any reason why a harmless error rule should not apply to a failure to comply with 21 U.S.C. 851(b). See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). See, *e.g.*, *United States* v. *Scales*, 249 F.2d 368, 370 (7th Cir. 1957), cert. denied, 356 U.S. 945 (1958). Petitioner relies on *United States* v. *Garcia*, 526 F.2d 958 (5th Cir. 1976), and *United States* v. *Garrett*, 565 F.2d 1065 (9th Cir. 1977), cert. denied, 435 U.S. 974 (1978). But the holding in *Garcia* was based on the court of appeals' conclusion that there was confusion about which offense was charged as the prior conviction; the court suggested that "substantial compliance" with Section 851(b) — as opposed to the strict, ritualistic compliance urged by petitioner — would be sufficient in the absence of such confusion (see 526 F.2d at 961). The Ninth Circuit has explained that the holding in *Garrett* is based on a similar concern. See *United States* v. *Harris*, 592 F.2d 1058, 1061 (1979). In any event, the Fifth and

have, in cases subsequent to *Garcia* and *Garrett* that involved facts similar to those of the present case, applied a harmless error principle to uphold an enhanced sentence imposed without the inquiry required by Section 851(b). *United States* v. *Nanez*, 694 F.2d 405, 412-413 (5th Cir. 1982) (distinguishing *Garcia* on the ground that in *Nanez*, as in the present case, a challenge to the prior conviction would have been barred by 21 U.S.C. 851(e)); *Harris*, 592 F.2d at 1060-1061. See also *Hardy* v. *United States*, 691 F.2d 39, 41 (1st Cir. 1982) ("Strict compliance with some provisions of the statute may sometimes be dispensed with. See *United States* v. *Harris*, [*supra*].").[1]

If this case were remanded for resentencing — the only relief to which petitioner could possibly be entitled — the sentencing judge would have no information whatever that he did not have at the time he imposed the sentence petitioner now challenges. All that would occur in the resentencing proceeding is that petitioner would explicitly affirm that which he had previously affirmed to the district judge through counsel — the existence of his prior conviction. The only conceivable purpose of such an apparently pointless remand would be the didactic one of encouraging district judges to follow Section 851(b) closely, so as to avoid possible claims by defendants that they were not permitted to deny the existence or validity of prior convictions that were the basis for the enhancement of a sentence. Even assuming arguendo that such an exercise of the supervisory power could ever be warranted, there is no reason for this Court to take such action when the court of appeals did not consider it appropriate.

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[1]Petitioner does not cite *United States* v. *Ramsey*, 655 F.2d 398 (D.C. Cir. 1981), where the court remarked in a footnote, without explanation, that "strict compliance with 21 U.S.C. § 851(b) is required[;] substantial compliance is not sufficient." 655 F.2d at 400 n.7. But as the court also recognized (*ibid.*), that remark is dictum, because the sentence at issue in *Ramsey* was upheld.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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